Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CYPRUS AMAX COAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a taxpayer may commence an action to recover an unconstitutional tax without filing a timely claim for refund as required by Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a).

2. Whether an action to recover an unconstitutional tax is subject to the specific statute of limitations in 26 U.S.C. 6511(a) that applies, by its terms, to any suit to recover "any tax imposed by this title," or is instead subject only to the general statute of limitations in 28 U.S.C. 2401(a) that applies to "every civil action commenced against the United States."

PARTIES TO THE PROCEEDING

The following names appeared on the captions of complaints that were filed in this case with the United States Court of Federal Claims:

Action No. 97-68 T:

CYPRUS AMAX COAL COMPANY
CYPRUS WESTERN COAL COMPANY
MOUNTAIN COAL COMPANY
THUNDER BASIN COAL COMPANY
CANYON FUEL COMPANY LLC
SKYLINE COAL COMPANY
SOLDIER CREEK COAL COMPANY
SOUTHERN UTAH FUEL COMPANY
UTAH FUEL COMPANY
(C.A. App. A- 25)

Action No. 97-310 T:

CONSOL OF KENTUCKY, INC.
CONSOL PENNSYLVANIA COAL COMPANY
CONSOLIDATION COAL COMPANY
GARDEN CREEK POCAHONTAS COMPANY
ISLAND CREEK COAL COMPANY
LAUREL RUN MINING COMPANY
MCELROY COAL COMPANY
NINEVAH COAL COMPANY
QUARTO MINING COMPANY
(See App., *infra*, 1a; C.A. App. A-11 and A-12)

Action No. 97-311 T:

COLONY BAY COAL COMPANY
EASTERN ASSOCIATED COAL CORP.
PEABODY COAL COMPANY
PINE RIDGE COAL COMPANY
(C.A. App. A-14)

Action No. 97-317 T:

ANR COAL COMPANY, LLC
COASTAL COAL, LLC
(C.A. App. A-17)

Action No. 97-521 T:

MARTIKI COAL COMPANY
METTIKI COAL COMPANY
PERMAC, INC.
PONTIKI COAL COMPANY
RACE FORK COAL COMPANY
(C.A. App. A-20)

Action No. 97-522 T:

EAGLE ENERGY, INC.
ELK RUN COAL COMPANY
PEERLESS EAGLE COAL COMPANY
RAWL SALES PROCESSING CO.
(C.A. App. A-23)

The following eight new names appear on the caption of the briefs the appellants filed in the United States Court of Appeals for the Federal Circuit: Eagle Coal Company, Coastal Development Company, Sage Point Coal Company, Brooks Run Coal Company, Greenbrier Coal Company, Kingwood Coal Company, Virginia Iron, Coal and Coke Company, and Enterprise Coal Company.

"Eagle Coal Company" is an alternative name for a party already listed, Eagle Energy, Inc.; similarly, "Coastal Development Company" is an alternative name for Coastal Coal, LLC. Sage Point Coal Company has no connection with this case.

The following five companies merged into ANR Coal Company, LLC, after the years in suit: Brooks Run Coal Company, Greenbrier Coal Company, Kingwood Coal Company, Virginia Iron, Coal and Coke Company, and Enterprise Coal Company.

PARENT COMPANIES

All parent corporations and any publicly held companies that own 10 percent or more of the stock of a party are as follows. *Italics* indicate that the company is publicly held:

Named Party	**Parent Corporation and any publicly held company that owns 10 percent or more of the named party**
Cyprus Amax Coal Company	Amax Energy, Inc. *Cyprus Amax Minerals Company*
Cyprus Western Coal Company	(merged in 1997 into co-plaintiff Cyprus Amax Coal Company)

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Mountain Coal Company	Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*
Consol of Kentucky Inc.	Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Thunder Basin Coal Company	Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*
Consol of Pennsylvania Coal Company	Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Garden Creek Pocahontas Company	Island Creek Coal Company Island Creek Corporation I.C. Coal, Inc. Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Consolidation Coal Company	Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Island Creek Coal Company	Island Creek Corporation I.C. Coal, Inc. Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Laurel Run Mining Company	Island Creek Coal Company Island Creek Corporation I.C. Coal, Inc. Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
McElroy Coal Company	Consolidation Coal Company Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Ninevah Coal Company	Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Quarto Mining Company	Consolidation Coal Company Consol, Inc. *Consol Energy, Inc.* Rheinbraun U.S. GmbH Rheinbraun AG *RWE AG*
Eastern Associated Coal Corporation	Peabody Holding Company P & L Holdings Corporation LB I Group, Inc. Lehman Brothers Merchant Banking Partners II, L.P. Lehman Brothers Offshore Investment Partners II, L.P. Co-Investment Partners, L.P.

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Colony Bay Coal Company	Peabody Holding Company P & L Holdings Corporation LB I Group, Inc. Lehman Brothers Merchant Banking Partners II, L.P. Lehman Brothers Offshore Investment Partners II, L.P. Co-Investment Partners, L.P.
Peabody Coal Company	Peabody Holding Company P & L Holdings Corporation LB I Group, Inc. Lehman Brothers Merchant Banking Partners II, L.P. Lehman Brothers Offshore Investment Partners II, L.P. Co-Investment Partners, L.P.
Pine Ridge Coal Company	Peabody Holding Company P & L Holdings Corporation LB I Group, Inc. Lehman Brothers Merchant Banking Partners II, L.P. Lehman Brothers Offshore Investment Partners II, L.P. Co-Investment Partners, L.P.

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Coastal Coal, Inc.	*The Coastal Corporation* *American Natural Resources Company*
ANR Coal Company, LLC	*The Coastal Corporation* *American Natural Resources Company*
Mettiki Coal Company	Mapco Coal, Inc.
Martiki Coal Company	Mapco Coal, Inc.
Permac, Inc.	Mapco Coal, Inc.
Race Fork Coal Company	Mapco Coal, Inc.
Pontiki Coal Company	Mapco Coal, Inc.
Elk Run Coal Company	A.T. Massey Coal Company, Inc. *Fluor Corporation*
Eagle Energy, Inc.	Long Fork Coal Company A.T. Massey Coal Company, Inc. *Fluor Corporation*
Peerless Eagle Coal Company	A.T. Massey Coal Company, Inc. *Fluor Corporation*
Rawl Sales & Processing Company	A.T. Massey Coal Company, Inc. *Fluor Corporation*
Skyline Coal Company	Itochu Coal International, Ltd. Itochu Corporation Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Soldier Creek Coal Company	Itochu Coal International, Ltd. Itochu Corporation Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*
Southern Utah Fuel Company	Itochu Coal International, Ltd. Itochu Corporation Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*
Utah Fuel Company	Itochu Coal International, Ltd. Itochu Corporation Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*
Brooks Run Coal Company	*The Coastal Corporation* *American Natural Resources Company*
Greenbrier Coal Company	*The Coastal Corporation* *American Natural Resources Company*
Kingwood Coal Company	*The Coastal Corporation* *American Natural Resources Company*

Named Party	Parent Corporation and any publicly held company that owns 10 percent or more of the named party
Virginia Iron, Coal and Coke Company	*The Coastal Corporation* *American Natural Resources Company*
Enterprise Coal Company	*The Coastal Corporation* *American Natural Resources Company*
Canyon Fuel Company, LLC	Itochu Coal International, Ltd. Itochu Corporation Arch Western Resources, LLC Arch Western Acquisition Corporation *Arch Coal, Inc.*

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 205 F.3d 1369. The opinion of the Court of Federal Claims (App., *infra*, 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on March 14, 2000. The petition for rehearing and suggestion for rehearing en banc was denied on June 8, 2000 (App., *infra*, 15a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution of the United States provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 6511(a) provides, in relevant part:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

3. 26 U.S.C. 6532(a)(1) provides:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

4. 26 U.S.C. 7422(a) provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed

or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

5. 28 U.S.C. 1491(a)(1) provides, in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

6. 28 U.S.C. 2401(a) provides, in relevant part:

> * * * [E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

7. 28 U.S.C. 2501 provides, in relevant part:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues * * *.

STATEMENT

1. Respondents produce and sell coal mined within the United States. They are therefore subject to the federal excise tax imposed by Section 4121(a) of the Internal Revenue Code on all sales of "coal from mines located in the United States." 26 U.S.C. 4121(a). Since 1978, this excise tax has been imposed at varying rates, which currently are $1.10 per ton for coal from underground mines and $.55 per ton for coal from surface mines. 26 U.S.C. 4121(b).[1] The tax was enacted by Congress to fund benefits provided to coal miners under the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), 92 Stat. 11. All taxes received under the coal excise tax are transferred by the Treasury directly to the Black Lung Disability Trust Fund. See § 3(b), 92 Stat. 12. Before creating this Fund, the government had itself been paying various work-related disability benefits to coal miners. The Fund was established as a mechanism to "transfer those costs from the Government to the industry (by way of the trust fund revenues from the tax on coal)." S. Rep. No. 336, 95th Cong., 1st Sess. 8-9 (1977).

2. a. Although Congress ordinarily exempts sales "for export" from the reach of federal excise taxes (26 U.S.C. 4221(a)(2)), Congress specified that this statutory exemption for export sales is *not* applicable to the coal excise tax. *Ibid.*[2] In order to place the burden of funding Trust Fund benefits

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[1] This excise tax is subject to a ceiling of 4.4% of the sales price. 26 U.S.C. 4121(b)(3). In the first year in which there is no balance due to the Black Lung Disability Trust Fund for advances made to fund benefits paid from that Fund, or in any event by the year 2014, the rate of tax will be reduced to $.55 per ton for coal from underground mines and $.25 per ton for coal from surface mines. 26 U.S.C. 4121(e).

[2] Section 4221(a) of the Internal Revenue Code specifies that "no tax shall be imposed under this chapter (*other than under section 412* * * *)" on the sale of an article "for export * * * ." 26 U.S.C. 4221(a), (a)(2) (emphasis added).

on those who benefit from the work performed by coal miners, Congress imposed the coal excise tax on *all* sales of coal mined in the United States, including export sales. 26 U.S.C. 4121(a), 4221(a)(2); note 2, *supra*.

For many years following enactment of the coal excise tax in 1978, respondents paid this federal tax on both domestic and export sales of coal. In 1996, however, this Court held in *United States* v. *International Business Machines Corp.*, 517 U.S. 843, 863 (1996), that a nondiscriminatory federal tax may not constitutionally be applied to export sales. Following that decision, respondents filed six separate actions in the United States Court of Federal Claims to recover the excise taxes they had paid on exported coal. C.A. App. A5-A24, A25.

These cases were consolidated in the Court of Federal Claims. Respondents have advanced three theories in support of their request for a refund of the coal excise taxes paid on exported coal. They contend that (i) the coal excise tax, as imposed on exports, violates the Export Clause of the Constitution (U.S. Const. Art. I, § 9, Cl. 5); (ii) the coal excise tax, as imposed on exports, takes private property for public use without just compensation in violation of the Fifth Amendment of the Constitution; and (iii) respondents have an implied contract with the government for the return of any coal excise tax paid on exports. C.A. App. A30-A32.[3]

b. Section 7422(a) of the Internal Revenue Code specifies that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged

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[3] Only the second amended complaint of respondent Cyprus Amax Coal Company appears in the appendix filed in the court of appeals. Respondents state in their appellate brief, however, that "[t]he complaints filed by the plaintiffs in the other actions that were consolidated [in this case] are the same in all material respects as Cyprus Amax's Second Amended Complaint in that action." Brief for Plaintiffs-Appellants 6 n.2, *Cyprus Amax Coal Co.* v. *United States*, No. 99-5060 (Br. of Appellants).

to have been erroneously or illegally assessed or collected * * * until a claim for refund has been duly filed with the Secretary." 26 U.S.C. 7422(a). Section 6532(a)(1) further provides that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax * * * shall be begun before the expiration of 6 months from the date of filing the claim required under such section" unless the Secretary has rendered a decision on the claim. 26 U.S.C. 6532(a)(1). And, Section 6511(a) generally requires every claim for refund "of any tax imposed by this title" to be filed within three years of the date of the taxpayer's return or within two years of the date the tax was paid, "whichever of such periods expires the later." 26 U.S.C. 6511(a).

In each of the cases filed by respondents, however, they either (i) filed no refund claim before commencing their suit (in violation of 26 U.S.C. 7422(a)) or (ii) failed to wait the required six months after filing a refund claim (in violation of 26 U.S.C. 6532(a)(1)). App., *infra*, 3a. The Court of Federal Claims therefore dismissed each of these cases due to the failure of respondents to comply with the refund claim requirements of the Internal Revenue Code. *Id.* at 20a-21a, 23a.

In an order dated January 8, 1999, the Court of Federal Claims rejected respondents' contention that compliance with the statutory refund claim requirements is unnecessary "because an administrative agency cannot declare a statute unconstitutional." App., *infra*, 20a. As the court explained (*id.* at 20a-21a (emphasis added)):

> [W]e do not have the authority to ignore an Act of Congress that is clear and unequivocal. 26 U.S.C. § 7422(a) states:
>
> > "No suit or proceeding shall be maintained in any court for the recovery of an internal revenue tax * * * until a claim for refund or credit has been

> duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."
>
> *This language does not permit an exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional.* For this reason, we must hold that those of plaintiffs' claims that have not been submitted to the appropriate agency pursuant to statute are barred.

By its terms, the court's order of January 8, 1999, dealt only with the cases in which respondents had failed to file any claim for refund. After that order was entered, however, the parties agreed that the court's reasoning also required dismissal of the additional cases in which certain respondents had submitted a claim for refund (in compliance with Section 7422(a)) but had commenced the judicial action less than six months after those claims for refund were filed (in violation of Section 6532(a)(1)). C.A. Supp. App. SA4. To implement the court's prior order, the parties jointly moved the court to enter a final order dismissing the consolidated cases. *Id.* at SA5. The court entered a final judgment dismissing the cases without prejudice on February 2, 1999. App., *infra*, 23a.

c. Respondents then filed administrative refund claims in accordance with the requirements of the Internal Revenue Code and, after six months expired, filed new refund suits in the Court of Federal Claims. Those new actions seek recovery of the taxes paid for *some*, but not *all*, of the years covered by the original suits. Br. of Appellants 5 n.1. See 26 U.S.C. 6511(a); page 8, *infra*. In an effort to recover taxes paid during the periods that are not covered by their new

suits, respondents appealed the dismissal of the original refund actions to the Federal Circuit.[4]

3. a. The court of appeals reversed and remanded. The court first stated that the jurisdictional issue presented in this case was not made moot by the filing of the new refund actions in the lower court. The court reasoned that relief would be available in this suit that would not be available in the new refund actions "because [respondents] can potentially recover an additional three years of taxes under the Tucker Act than under a tax refund claim." App., *infra*, 6a.[5]

b. Reaching the jurisdictional issue presented in this case, the court of appeals reversed the judgment entered by

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[4] Most of the new actions have been suspended pending final resolution of the present case. Two of the new actions were not suspended, but the government has moved to dismiss those suits under 28 U.S.C. 1500, which provides that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit * * * against the United States * * * ." These motions to dismiss are still pending. App., *infra*, 6a n.3. Because the Internal Revenue Service has not notified respondents that their belated claims for refund have been disallowed, the two-year period of limitations for the filing of a refund suit has not commenced to run. A refund suit may be commenced at any time after six months from the date the refund claim is submitted to the agency and before two years after the mailing by the agency "of a notice of the disallowance" of the claim. 26 U.S.C. 6532(a)(1).

[5] The United States stipulated on appeal that, although the order of dismissal was entered in response to a joint motion of the parties, the agreed order merely implemented the lower court's order of January 8, 1999, and is therefore tantamount to "an involuntary dismissal without prejudice" that is "appealable as a final judgment." App., *infra*, 4a. The court agreed with that understanding of the record, and pointed out that it is well established that "an involuntary dismissal without prejudice is appealable as a final judgment." *Ibid.* (citing, *e.g.*, *Nasatka* v. *Delta Scientific Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995), cert. denied, 516 U.S. 1112 91996); Charles Wright et al., *Federal Practice and Procedure* § 3914.6 (2d ed. 1992)).

the lower court and remanded for further proceedings on the merits of the respondents' claims. The court of appeals held that respondents are not required to comply with the requirements on tax refunds imposed under the Internal Revenue Code because they possess a wholly independent right under the Tucker Act to recover money damages against the United States for the unconstitutional tax. The court acknowledged that the Tucker Act is a purely jurisdictional statute that authorizes the Court of Federal Claims to "have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States * * * ." 28 U.S.C. 1491(a)(1). Because the Tucker Act is purely jurisdictional, the court noted that any right to recover a money judgment against the United States must be found in some other source of federal law—such as a statute or constitutional provision that may "be 'fairly interpreted as mandating compensation by the Federal Government for the damages sustained.'" App., *infra*, 7a (quoting *United States* v. *Mitchell*, 463 U.S. 206, 217 (1983)). The court concluded that the Export Clause of the Constitution, rather than the Internal Revenue Code, is the source of respondent's substantive right to recover against the United States in this case (App., *infra*, 7a-8a):[6]

> The necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted. Indeed, just as Congress's power to lay taxes enables it to collect

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[6] The Court stated that the records of the Constitutional Convention reflect that the Framers intended the Export Clause to prevent States from bearing disproportionate tax burdens because of their exports (App., *infra*, 8a) and concluded that "the recognition of a monetary remedy furthers that purpose." *Ibid.*

> money, *see* U.S. Const. art. I, § 8, cl. 1, the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause. * * * Thus, given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy.

In reaching that conclusion, the court of appeals relied on *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998). In *United States Shoe*, this Court held that the Harbor Maintenance Tax, 26 U.S.C. 4461, was invalid under the Export Clause as applied to exported goods. The court of appeals stated (App., *infra*, 8a-9a):

> In so holding, the Supreme Court affirmed this court's five-judge panel decision in which we also struck down the statute and awarded money damages equaling the amount exacted under the HMT. * * * Thus, read in the context of the opinions below, the Supreme Court's *U.S. Shoe* decision makes clear that the Export Clause includes a correlative right to money damages as a remedy for its violation.

c. After finding a substantive right to recover unconstitutional excise taxes under the Export Clause, the court of appeals then held that the provisions of the Internal Revenue Code that require the filing of an administrative refund claim (26 U.S.C. 7422(a)) and that impose a statute of limitations on the recovery of such taxes (26 U.S.C. 6511(a)) are inapplicable to this suit.

(i) Although the "clear and unequivocal" (App., *infra*, 20a) requirements of the Internal Revenue Code by their terms prohibit "any court" of the United States from maintaining any "suit or proceeding * * * for the recovery of any internal revenue tax * * * until a claim for refund or credit has been duly filed" in accordance with law (26 U.S.C.

7422(a)), the court of appeals simply ignored this statute and dismissed it as irrelevant to this case. The court stated that a "cause of action based on the Export Clause is self-executing" and that "a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." App., *infra*, 9a.

The sole authority cited by the court of appeals for this proposition was its own decision in *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir. 1992). In *Hatter*, which is pending on petition for writ of certiorari before this Court on different issues (No. 99-1978),[7] the court of appeals concluded that certain federal judges who had been required to pay, and who had paid, certain federal taxes could be made whole for those required payments in a suit for money damages against the United States under the Compensation Clause. The court's holding in that case was not based on an assumption that the judges could not be, and were not, legally obligated to pay taxes imposed on them (and other citizens) by Congress. What was regarded as unconstitutional in *Hatter* was not the tax itself, but the asserted "diminution in compensation" resulting from the newly imposed tax obligation. See 203 F.3d at 796. Without acknowledging that fundamental distinction between *Hatter* and the present case, the court of appeals stated in this case that the judges in *Hatter could* have pursued a tax refund suit (rather than

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[7] *Hatter* has had a long history. The full citation, to date, is: *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990), rev'd, 953 F.2d 626 (Fed. Cir. 1992), on remand, 31 Fed. Cl. 436 (1994), rev'd, 64 F.3d 647 (Fed. Cir. 1995), aff'd for lack of a quorum, 519 U.S. 801 (1996), on remand, 38 Fed. Cl. 166 (1997), aff'd and rev'd in part, 185 F.3d 1356 (Fed. Cir.), rehearing en banc granted and opinion vacated, 199 F.3d 1316 (Fed. Cir. 1999), opinion reinstated in part and superseded in part, 203 F.3d 795 (Fed. Cir. 2000). The United States filed a second petition for a writ of certiorari on June 8, 2000, and that petition (No. 99-1978) remains pending at the time of this filing.

an action for damages under the Compensation Clause) and that the present case is therefore indistinguishable from *Hatter* (App., *infra*, 10a-11a):

> [L]ike the plaintiffs in *Hatter*, Cyprus was not required to pursue an administrative refund claim before filing suit because the Export Clause provides a self-executing cause of action that is not subject to compliance with the tax refund statute. Put differently, Cyprus had two alternative avenues through which to obtain relief—a tax refund action or a cause of action based on the Export Clause—and either one is sufficient to invoke the Court of Federal Claims' jurisdiction under the Tucker Act.

(ii) The court of appeals similarly found it unnecessary to address the plain text of the statute of limitations in Section 6511(a), which by its express terms governs all claims for a "refund * * * of *any tax imposed by this title*." 26 U.S.C. 6511(a) (emphasis added). Without any discussion or analysis of this statute, the court of appeals simply stated that the general six-year statute of limitations "for a cause of action brought under the Tucker Act" rather than the shorter statute of limitations "for a tax refund action" under Section 6511(a) governs here. App., *infra*, 5a (citing 28 U.S.C. 2501). The only explanation provided by the court for this conclusion was the unsupported statement that "a different statute of limitations pertains to the Tucker Act than to the tax refund statutes." *Id.* at 5a.[8]

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[8] In *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), a federal district court held that this Court's 1996 decision in *United States* v. *International Business Machines*, *supra*, requires the conclusion that the coal excise tax is unconstitutional as applied to sales of coal for export. At the same time, the court noted that a refund of unlawfully collected excise taxes is permitted only if the taxpayer complies with Section 6416 of the Internal Revenue Code, which requires the taxpayer to establish that it "has not included the tax in the price of the

REASONS FOR GRANTING THE PETITION

The court of appeals erred in concluding that a taxpayer may commence an action to recover an unconstitutional tax without filing a timely claim for refund and without complying with the statute of limitations that Congress enacted to govern *all* suits to recover "any tax imposed" under the Internal Revenue Code (26 U.S.C. 6511(a)). In reaching its conclusion, the court of appeals ignored the plain, governing text of these provisions and the clear contrary holdings of this Court.

By abandoning longstanding statutory restrictions on the jurisdiction afforded to federal courts to enter money judgments in cases for the recovery of taxes from the United States, the decision in this case presents an issue of exceptional importance. Moreover, because the Federal Circuit has nationwide jurisdiction, and because all taxpayers may sue for recovery of an allegedly unlawful tax in the Court of Federal Claims, it is unlikely that other courts of appeals will have an opportunity to review this same issue.[9] In similar circumstances, this Court has recognized

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article * * * and has not collected the amount of the tax from the person who purchased such article." 26 U.S.C. 6416(a)(1)(A). 33 F. Supp. 2d at 468.

The Internal Revenue Service has acquiesced in the holdings of the court in *Ranger Fuel* and has announced that it will accept properly submitted and substantiated claims for refund of coal excise taxes paid on exports during periods that are not foreclosed by the statute of limitations for tax refund claims set forth in Section 6511 of the Internal Revenue Code. Notice 2000-28, 2000-21 I.R.B. 1116. The refund demands asserted by respondents in the present case that were not brought within the statute of limitations of Section 6511 would not be refunded under the Service's acquiescence in *Ranger Fuel*.

[9] In addition to abandoning, for constitutional claims, the complex system of tax administration established by Congress, the decision of the Federal Circuit in this case would also disrupt ordinary appellate practice

the need for plenary review of Federal Circuit decisions of significant fiscal importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

1. a. Respondents brought this suit to recover an internal revenue tax alleged to have been assessed and collected on exported goods in violation of the Export Clause of the Constitution. Congress, however, has specified that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary." 26 U.S.C. 7422(a). And, even after such an administrative refund claim has been duly filed, Congress has further specified that "[n]o suit or proceeding" may be maintained "for the recovery of any internal revenue tax" until the claim has been disallowed or "6 months [has passed] from the date of filing of the claim." 26 U.S.C. 6532(a)(1). It is undisputed that respondents failed to conform to these

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concerning such claims. If a taxpayer has complied with the tax refund requirements of the Internal Revenue Code and brings suit in federal district court to recover the tax under 28 U.S.C. 1346(a)(l), any appeal in that case would lie to the appropriate regional court of appeals rather than to the Federal Circuit. 28 U.S.C. 1294, 1295(a)(2). Under the reasoning of the Federal Circuit in this case, however, if the amount involved in such a case were less than $10,000, and the jurisdiction of the district court were therefore based upon 28 U.S.C. 1346(a)(2) (the "Little Tucker Act"), an appeal would lie *only* to the Federal Circuit if the taxpayer alleges that the tax is unconstitutional. This is because, under 28 U.S.C. 1295(a)(2), jurisdiction of an appeal exists in the Federal Circuit, not in the regional courts of appeals, for actions against the United States that involve less than $10,000 and that are "founded" upon the Constitution rather than upon an Act of Congress or other source of law. *Ibid.*

statutory prerequisites to "the recovery of any internal revenue tax." 26 U.S.C. 7422(a).

The court of appeals held that these statutory prerequisites to suit are inapplicable to this case on the theory that "a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." App., *infra*, 9a. As the Court of Federal Claims correctly concluded, however, the "clear and unequivocal" language of these statutes "does not permit an exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional." *Id.* at 21a. This Court has made clear that these statutory restrictions on suits to recover taxes paid to the United States effect a waiver of the government's sovereign immunity from suit and are to be strictly applied in accordance with their terms: "The permission to sue is conditioned on the filing of a claim and the lapse of six months or the disallowance of the claim within that period * * * ." *United States* v. *Michel*, 282 U.S. 656, 658 (1931).[10] These statutory requirements of a duly filed refund claim and a six-month waiting period originated in the Act of July 13, 1866, ch. 184, § 19, 14 Stat. 152. This Court has consistently held that these ancient statutory requirements "governing refund suits in the United States District Court for the United States Court of Federal Claims * * * make timely filing of a refund claim a jurisdictional prerequisite to bringing suit, see 26 U.S.C. § 7422(a)." *Commissioner* v. *Lundy*, 516 U.S. 235, 240 (1996). The decision of the court of

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[10] In the Act of June 6, 1872, ch. 315, § 44, 17 Stat. 257, Congress adopted a two-year statute of limitations on "all suits and proceedings for the recovery of any internal tax * * * ." This limitations provision has been amended on several occasions. It now generally requires refund claims to be filed within three years of the date of the return or two years of the date the tax was paid, whichever period is greater. 26 U.S.C. 6511(a). See *Commissioner* v. *Lundy*, 516 U.S. 235, 239-240 (1996).

appeals in this case thus contradicts both the clearly expressed text of the governing provisions and the consistent jurisdictional holdings of this Court.

b. In concluding that the statutory restrictions on the recovery of taxes paid to the United States are inapplicable to suits in which a taxpayer contends that the tax is unconstitutional, the Federal Circuit manifestly erred in relying on this Court's decision in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 367-370 (1998). The court of appeals correctly noted (App., *infra*, 8a-9a) that the plaintiffs in the *United States Shoe* case were allowed to recover an unconstitutional exaction under the Harbor Maintenance Tax, 26 U.S.C. 4461, even though they had not complied with the refund claim requirements under Section 7422(a) of the Code. What the court of appeals overlooked, however, is that the Harbor Maintenance Tax contains a *unique* provision that expressly makes the refund claim requirements of the Internal Revenue Code inapplicable to that specific exaction.

Congress specifically provided in Section 4462(f)(3) that the Harbor Maintenance Tax "shall not be treated as a tax for purposes of subtitle F or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. 4462(f)(3). Since Sections 6511, 6532 and 7422 are contained in subtitle F of the Code, and since those provisions relate to "the administration and enforcement of internal revenue taxes," these administrative claim requirements of the Internal Revenue Code were expressly inapplicable in the *United States Shoe* case.[11] Nothing in the decision in *United States Shoe* thus even remotely

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[11] Instead, the entirely different administrative requirements established under "customs laws and regulations" apply to the Harbor Maintenance tax. 26 U.S.C. 4462(f)(1). See *United States Shoe*, 523 U.S. at 365-366 & n.3.

provides support for the holding of the court of appeals that the statutory restrictions "contained in subtitle F of the Code" on actions seeking to recover tax payments—including, in particular, Sections 6511, 6532 and 7422 of the Code— are irrelevant when a taxpayer contends that the tax is unconstitutional.

c. The court of appeals also plainly erred in relying on the fact that jurisdiction in this case is based upon the Tucker Act, 28 U.S.C. 1491(a)(1). See App., *infra*, 6a-7a. The jurisdiction for *every* action to recover a tax in the Court of Federal Claims has its basis in the Tucker Act. That statute grants that court "jurisdiction * * * upon any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28 U.S.C. 1491(a)(1).[12] The provisions of the Internal Revenue Code do not confer any jurisdiction on the Court of Federal Claims. They do, however, specify that a refund claim must be duly filed before "any court" (which unquestionably encompasses the Court of Federal Claims) may "maintain" any "suit or proceeding * * * for the recovery of any internal revenue tax." 26 U.S.C. 7422(a). See also 26 U.S.C. 6511(a), 6532(a)(1). Nothing in the general text of the Tucker Act relates to,

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[12] Every suit for the recovery of taxes is founded "either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. 1491(a)(1). The jurisdiction of the Court of Federal Claims for *every* tax refund suit is thus based upon the provisions of the Tucker Act, 28 U.S.C. 1491(a)(1). By contrast, the jurisdiction of the district courts over tax controversies is based upon 28 U.S.C. 1346(a)(1), which grants jurisdiction to the district courts over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * *." *Ibid.* Like the jurisdiction of the Court of Federal Claims under the Tucker Act, the jurisdiction of the district courts in tax controversy cases is subject to the statutory restrictions set forth in Section 6511(a), Section 6532(a)(1), and Section 7422(a) of the Internal Revenue Code.

addresses, or overrides those specific statutory restrictions on suits for the recovery of taxes. The assertion of the Federal Circuit that the proper resolution of this case turns on "whether [respondents] alleged a cause of action within the Court of Federal Claims' jurisdiction under the Tucker Act" (App., *infra*, 6a) is thus manifestly unfounded.

d. The decision of the Federal Circuit in *Hatter* v. *United States*, *supra*, also provides no support for its conclusion in this case. In *Hatter*, judges who became liable for a federal tax argued that they were constitutionally entitled to additional compensation from the United States to make them whole for the requirement that they pay the new tax. The judges did not assert that the new tax could not lawfully be imposed on them (along with all other citizens); instead, they contended that, under the Compensation Clause of the Constitution, they were entitled to additional compensation from the United States to reimburse them for the new taxes that they were required to pay. In holding that the judges were entitled to the additional compensation that they sought, the court did not award the judges an impermissible refund of the taxes paid. Instead, the court directed that the judges be awarded damages for the "diminution in their compensation." 203 F.3d at 796. Nothing in the *Hatter* decision (with which we disagree on the merits (No. 99-1979)) supports the conclusion of the court of appeals in this case that a claim for the recovery of taxes based upon a violation of the Export Clause is not a claim "for the recovery of any internal revenue tax" which, under the clear text of Section 7422(a), may not "be maintained in any court * * * until a claim for refund * * * has been duly filed with the Secretary." 26 U.S.C. 7422(a).

2. The decision of the court of appeals not only voids the administrative prerequisites for a tax refund suit, it also

alters the statute of limitations that applies to such suits.[13] Section 6511(a) of the Internal Revenue Code establishes a statute of limitations that governs every "[c]laim for credit or refund * * * of any tax imposed by this title [Title 26]." 26 U.S.C. 6511(a).[14] The coal excise tax is imposed by 26 U.S.C. 4121(a), and it is thus unquestionably a tax imposed by Title 26 to which the statute of limitations in Section 6511(a) applies. Under Section 6511(a), taxpayers are generally required to file refund claims within three years of their returns or within two years of the date the tax was paid, whichever period is more generous. See *Commissioner* v. *Lundy*, 516 U.S. at 239-240. The plain language of this statute applies directly to the present case: (i) respondents demand a refund of a tax imposed by Title 26 (26 U.S.C. 4121); (ii) they were required to file returns for this tax (see 26 U.S.C. 6011(a); 26 C.F.R. 40.6011(a)-1(a)(1)); and (iii) they did in fact file returns for this tax (C.A. App. A35-A44). Under the statute of limitations that Congress enacted to govern all actions for a refund of "any tax imposed by [Title 26]," respondents thus may not recover any taxes paid in periods prior to three years preceding the filing of their refund claims. 26 U.S.C. 6511(a).

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[13] In addition, on the theory that the taxpayer's suit is for "damages" rather than for the "recovery of taxes," the reasoning applied by the court of appeals in this case would arguably make the taxpayer's action immune from the well-established requirement that he must pay the entire amount of the tax before being entitled to sue for a refund of the tax. See *Flora* v. *United States*, 362 U.S. 145 (1960).

[14] Section 6511(a) provides:

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

The court of appeals nonetheless held that, even though respondents failed to comply with these statutory requirements, they are to be allowed to recover taxes paid *six years* prior to the commencement of suit. The court stated that the period of limitations in Section 6511(a) is irrelevant because "[t]he statute of limitations is six years for a cause of action brought under the Tucker Act. *See* 28 U.S.C. § 2501 (1994)." App., *infra*, 5a.[15]

This conclusion of the court of appeals conflicts directly with the controlling precedents of this Court. The fact that the Tucker Act generally provides a six-year statute of limitations for civil actions for monetary relief commenced against the United States (see note 15, *supra*) does not override the narrower, three-year limitations period for the recovery of taxes collected under the Internal Revenue Code. This Court addressed and resolved that very issue in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941). In *Kreider*, this Court reversed a decision that applied the six-year statute of limitations under the Tucker Act to a tax refund suit, rather than the five-year statute that then governed tax refund suits. The Court explained (*id.* at 447-448) emphasis added)):

> [T]he court below held that the action was not barred because the Tucker Act (24 Stat. 505), later incorporated in § 24 (20) of the Judicial Code, rather than § 1113 (a) [the predecessor of the current tax-refund statute of limitations in 26 U.S.C. 6511(a)] prescribed the period

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[15] 28 U.S.C. 2501 specifies that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." In addition, 28 U.S.C. 2401(a) specifies that, "[e]xcept as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

within which respondent was bound to bring suit. We view the statutes differently.

Section 24 (20) gives the district courts jurisdiction concurrent with the Court of Claims of certain suits against the United States. To equate the right thus conferred to the existing right to sue in the Court of Claims (see 28 U.S.C. § 262), the statute provides: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

We think *the quoted language was intended merely to place an outside limit on the period within which all suits might be initiated under § 24 (20). Clearly, nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions* even though they are brought under § 24 (20). Phrasing the condition negatively, Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment. * * *.

Section 1113 (a) is precisely that type of provision. Recognizing that suits against the United States for the recovery of taxes impeded effective administration of the revenue laws, Congress allowed only five years from payment of the tax for the commencement of such actions, unless specified circumstances extended the period. That this specific provision is entirely consistent with the general provision in § 24 (20) is plain. Indeed, the limitation in § 1113 (a) has no meaning whatever unless the limitation in § 24 (20) is construed not to govern proceedings for the recovery of "internal-revenue

tax alleged to have been erroneously or illegally assessed or collected."

This Court has noted that the specific time limitations contained in Section 6511 are "set[] forth in unusually emphatic form." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). Congress plainly did not intend these "emphatic" limitations for the recovery of taxes to be rendered ineffective by the general provisions of the Tucker Act, which establish only "an outside limit on the period within which all suits might be initiated" against the United States. *United States* v. *A.S. Kreider Co.*, 313 U.S. at 447.

In adopting its contrary view in this case, the Federal Circuit failed to address either the specific text of the applicable statutory provisions or the controlling decisions of this Court. The court of appeals not only disregarded the express holding of the *Kreider* case, it also failed to follow the decision of this Court in *United States* v. *New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906). In the *Cuba Mail* case, a taxpayer brought an action under the Tucker Act to obtain a refund of a stamp tax that had been imposed in violation of the Export Clause. This Court held that the action should be dismissed because the taxpayer had failed to make an administrative protest before paying the tax—a protest which, at that time, was a statutory prerequisite to any suit for recovery of an unlawful tax. 200 U.S. at 493 (citing *Chesebrough* v. *United States*, 192 U.S. 253 (1902)). The decision of the court of appeals in the present case, which holds that compliance with the statutory administrative refund requirements is unnecessary when it is alleged that the tax is unconstitutional, thus flatly contradicts the decision of this Court in *Cuba Mail*.[16]

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[16] The court of appeals erred in stating that the decision in *Cuba Mail* is inapposite on the theory that the plaintiff in that case had "proceeded under a tax refund statute" rather than under the general jurisdiction of

3. Under the decision in this case, the statutory prerequisites to a tax refund suit are irrelevant if the tax has assertedly been imposed in violation of the Export Clause or any other constitutional provision that can be interpreted as supporting a claim for monetary relief. App., *infra*, 7a-8a. In creating an exception for an entire class of tax refund suits from the detailed tax administration provisions enacted by Congress, the Federal Circuit has ignored the fact that the administrative tax refund provisions involved in this case, and Section 6511(a) in particular, represent waivers of sovereign immunity that must be strictly construed and enforced. As this Court stated in addressing Section 6511(a) in *United States* v. *Dalm*, 494 U.S. 596, 608 (1990)(citations omitted):

> Under settled principles of sovereign immunity, "the United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" * * * A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms. * * * "[A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'"

When Congress enacted the Tucker Act, it granted the courts jurisdiction to determine claims founded upon the Constitution. But Congress unquestionably has power to limit the jurisdiction that it grants. Under the "clear and

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the Tucker Act. App., *infra*, 12a. As this Court noted in *Cuba Mail*, the plaintiff in that case claimed "a right of action under the Tucker Act," however, that was founded both on the Export Clause and on the revenue statute allowing refunds. 200 U.S. at 491, 494. See also *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915).

unequivocal" text of Section 7422(a) (App., *infra*, 20a), when a taxpayer brings a suit founded upon the Constitution to recover any internal revenue tax, the action may not "be maintained in any court" unless the taxpayer has "duly filed" a timely claim for refund in accordance with the requirements of Section 6511(a). 26 U.S.C. 7422(a). In disregarding the plain text of these provisions, the court of appeals improperly "extend[ed] the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979).

The failure of the court of appeals to honor the plain text of the statutes that prescribe and limit its jurisdiction, and its failure to abide by the consistent decisions of this Court that interpret and apply those statutes, warrants review by this Court. No other court can correct the Federal Circuit's misapplication of the jurisdictional provisions that govern suits for the recovery of taxes in that circuit. And, since every taxpayer may bring suits for the recovery of taxes that would be reviewable in that circuit, the decision in this case is (as this consolidated action itself reflects) nationwide in its effect. See pages II-XI, *supra*. Review by this Court is warranted to assure that the federal courts in which Congress has invested broad authority over claims against the United States comply with the carefully articulated statutes that Congress enacted to establish and to limit their jurisdiction in tax controversies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5060

CYPRUS AMAX COAL COMPANY, CYPRUS WESTERN COAL COMPANY, MOUNTAIN COAL COMPANY, THUNDER BASIN COAL COMPANY, CONSOL OF KENTUCKY INC., CONSOL PENNSYLVANIA COAL COMPANY, CONSOLIDATION COAL COMPANY,
GARDEN CREEK POCAHONTAS COMPANY, ISLAND CREEK COAL COMPANY, LAUREL RUN MINING COMPANY, CELROY COAL COMPANY, NINEVAH COAL
COMPANY, QUARTO MINING COMPANY, COLONY BAY COAL COMPANY, EASTERN ASSOCIATED COAL CORP., PEABODY COAL COMPANY, PINE RIDGE COAL COMPANY, ANR COAL COMPANY, LLC, COASTAL COAL, INC., MARTIKI COAL COMPANY, METTIKI COAL COMPANY, PERMAC, INC., PONTIKI COAL COMPANY, RACE FORK COAL COMPANY, EAGLE ENERGY, INC., ELK RUN COAL COMPANY, PEERLESS EAGLE COAL COMPANY, RAWL SALES & PROCESSING, CO., CANYON FUEL COMPANY LLC, SKYLINE COAL COMPANY, SOLDIER CREEK COAL COMPANY, SOUTHERN UTAH FUEL COMPANY, EAGLE COAL COMPANY, UTAH FUEL COMPANY, BROOKS RUN COAL COMPANY, GREENBRIER COAL COMPANY, KINGWOOD COAL COMPANY, VIRGINIA IRON, COAL AND COKE COMPANY, ENTERPRISE COAL COMPANY, COASTAL DEVELOPMENT COMPANY AND SAGE POINT COAL COMPANY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

[Decided: March 14, 2000]

Before: PLAGER, LOURIE, and GAJARSA, *Circuit Judges.*

GAJARSA, *Circuit Judge.*

Cyprus Amax Coal Company and the other named plaintiffs (collectively "Cyprus") are producers, sellers, and exporters of coal. Cyprus appeals the United States Court of Federal Claims' judgment dismissing the Cyprus complaint without prejudice for lack of jurisdiction. *See Cyprus Amax Coal Co. v. United States*, Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, 97-522 T (Fed. Cl. Feb. 2, 1999). Cyprus alleged that the Coal Sales Tax, 26 U.S.C. § 4121 (1994) ("Coal Tax"), violates the Constitution's Export Clause and Takings Clause. The Court of Federal Claims held that it lacked jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994), to entertain those claims because Cyprus did not comply with the administrative process for obtaining a tax refund. Because we hold that the Export Clause provides an independent cause of action for monetary remedies that invokes the Court of Federal Claims' jurisdiction under the Tucker Act, we reverse and remand. We do not reach the issue of whether the Takings Clause provides an independent cause of action.

BACKGROUND

Cyprus commenced an action in the Court of Federal Claims seeking a refund for the payment of coal excise taxes in connection with the Coal Tax, which imposes a tax "on coal from mines located in the United States sold by the producer." 26 U.S.C. §4121. While Congress generally exempts articles sold for export from excise taxes, the export sales of coal do not enjoy such an exemption. *See* 26 U.S.C. § 4221(a)(2) (1994) (providing that "no tax shall be imposed under [the Manufacturers Excise Taxes] chapter (other than under the [Coal Tax] . . .) on the sale by the manufacturer . . . of an article for export, or for resale by

the purchaser to a second purchaser for export"). Accordingly, Cyprus alleged that the Coal Tax violates the Export Clause, U.S. Const. Art. I, § 9, cl. 5, and the Takings Clause, U.S. Const. amend. V.

The Cyprus plaintiffs comprised two sub-groups: (1) those who did not file for a tax refund with the Internal Revenue Service ("IRS"), *see* 26 U.S.C. § 7422(a) (1994),[1] and (2) those who did file for a refund but failed to wait the requisite six months before commencing suit, *see* 26 U.S.C. § 6532(a) (1994).[2] In its January 8, 1999 order, the Court of Federal Claims treated both plaintiff sub-groups as having failed to file for a tax refund and dismissed their complaint for lack of jurisdiction. Specifically, the court reasoned that

> [Section 7422(a)'s] language does not permit an exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional. For that reason, we must hold that those of plaintiffs' claims that have not been submitted to the appropriate agency pursuant to the statute are barred. We will dismiss those claims without prejudice.

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[1] Section 7422(a) provides as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary. . . .

26 U.S.C. § 7422(a).

[2] Section 6532(a) provides as follows:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum shall be begun before the expiration of 6 months from the date of filing the claim. . . .

26 U.S.C. § 6532(a).

Cyprus Amax Coal Co. v. United States, Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, 97-522 T (Fed. Cl. Jan. 8, 1999) (preliminary order dismissing the complaint without prejudice).

Following that order, Cyprus and the United States Government ("the Government") filed a Joint Status Report and Motion to Enter Judgment of Dismissal Without Prejudice in which both parties agreed that nothing more needed to be decided because the court consolidated the plaintiffs and treated their complaint as a tax refund action. On February 2, 1999, in accordance with its earlier order, the Court of Federal Claims entered a judgment dismissing Cyprus's complaint without prejudice. *See Cyprus Amax Coal Co. v. United States*, Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T, 97-521 T, 97-522 T (Fed. Cl. Feb. 2, 1999) (entering judgment to dismiss complaint). Concurrent with filing this appeal, Cyprus complied with the tax refund statutes and commenced a tax refund action in the Court of Federal Claims.

DISCUSSION

Appellate Jurisdiction

Before determining whether the Court of Federal Claims had jurisdiction under the Tucker Act, we resolve preliminary issues concerning our jurisdiction over this appeal. At oral argument, the Government conceded that the Court of Federal Claims' order constituted an involuntary dismissal without prejudice. As a general rule, an involuntary dismissal without prejudice is appealable as a final judgment. *See Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580 (Fed. Cir. 1995); *see also McGuckin v. Smith*, 974 F.2d 1050, 1053 (9th Cir. 1992); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 590 n.1 (7th Cir. 1986); *see*

generally Charles Alan Wright et. al., *Federal Practice and Procedure* § 3914.6 (2d ed. 1992). That rule certainly applies to the present circumstances, in which the Court of Federal Claims dismissed Cyprus's entire complaint and re-filing the complaint with the same causes of action would be wasteful for Cyprus and a drain on judicial resources.

We also address whether Cyprus's subsequent compliance with the tax refund statute and filing of a tax refund action renders this appeal moot. We must dismiss an appeal as moot if an intervening event during the pendency of the appeal renders it impossible for this court to grant "'any effectual relief whatever [sic]' to the prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). The Court of Federal Claims dismissed Cyprus's constitutionally-based causes of action for lack of jurisdiction because Cyprus did not comply with the tax refund statute. On appeal, Cyprus requests this court to hold that complying with the tax refund statute is not a predicate for the Court of Federal Claims to exercise jurisdiction over those causes of action. However, given that Cyprus has now complied with the tax refund statute and filed a tax refund action, it can pursue the theories underlying its constitutionally-based causes of action through its tax refund action. The issue therefore is whether a decision in favor of Cyprus can afford it any relief more meaningful than it could otherwise obtain in its tax refund action.

Because this case involves a continuously imposed tax and a different statute of limitations pertains to the Tucker Act than to the tax refund statutes, this court can provide Cyprus with meaningful relief. The statute of limitations is six years for a cause of action brought under the Tucker Act. *See* 28 U.S.C. § 2501 (1994). Conversely, the statute of

limitations is three years for a tax refund action. *See* 26 U.S.C. § 6511(a) (1994). Thus, this appeal is not moot because Cyprus can potentially recover an additional three years of taxes under the Tucker Act than under a tax refund claim.[3]

The Tucker Act

On appeal, we must determine whether Cyprus alleged a cause of action within the Court of Federal Claims' jurisdiction under the Tucker Act. A determination of the Court of Federal Claims' jurisdiction presents a question of law that we review *de novo*. *See, e.g., Wheeler v. United States*, 11 F.3d 156, 158 (Fed. Cir. 1993). The Tucker Act, which constitutes a waiver of sovereign immunity by the United States, *see United States v. Mitchell*, 463 U.S. 206, 212 (1983), provides as follows:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. . . .

28 U.S.C. § 1491(a)(1) (1994).

The Tucker Act is a purely jurisdictional statute; on its own predicate, it does not enable a party to recover monetary damages from the United States. *See United States v. Testan*, 424 U.S. 392, 398 (1976); *New York Life Ins.*

---

[3] It is noted that some plaintiffs filed a motion to suspend the related proceedings and the Government did not object to the suspension. The Government has also filed motions to dismiss plaintiffs Greenbrier and Peabody's tax refund claims under 28 U.S.C. § 1500 (1994). We do not decide those motions at this time because they are still pending below.

Co. v. United States, 118 F.3d 1553, 1555-56 (Fed. Cir. 1997); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). Thus, to invoke jurisdiction under the Tucker Act, a party must point to a complementary substantive right found in another source of federal law, such as the Constitution, federal statutes, or executive regulations. *See Mitchell*, 463 U.S. at 216. In addition, that substantive right must be "fairly interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 217; *see Testan*, 424 U.S. at 400; *James v. Caldera*, 159 F.3d 573, 580 (Fed. Cir. 1998) (requiring a party "to assert a claim under a separate money-mandating constitutional provision, statute, or regulation" to invoke jurisdiction under the Tucker Act). This appeal therefore turns on whether the Export Clause, when fairly interpreted, affords an independent cause of action for monetary remedies.

The Export Clause

The Constitution's Export Clause states that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The Export Clause's mandate "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *United States v. International Bus. Machs. Corp.*, 517 U.S. 843, 848 (1996). The necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted. Indeed, just as Congress's power to lay taxes enables it to collect money, *see* U.S. Const. art. I, § 8, cl. 1, the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause. *Cf. Fairbank v. United States*, 181 U.S. 283, 300 (1901) (finding that constitutional provisions, whether granting or prohibiting a power to Congress, should be enforced with

equal and full effect). Thus, given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy.

The policies underlying the Export Clause confirm our textual interpretation. Records from the Federal Convention indicate that the Framers intended the Export Clause to allay the fears of certain States that they would bear a greater tax burden due to differing levels of exportation. *See, e.g.*, Max Farrand, *The Records of the Federal Convention of 1787* 307 (rev. ed. 1966) ("Mr. Gerry thought the legislature could not be trusted with such a power [to tax exports]. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it."); *id.* at 305 ("Mr. Mason urged the necessity of connecting with the power of levying taxes . . . that no tax should be laid on exports."). The Framers' decision to phrase the Export Clause in unconditional language serves to free all exports from such a burden, *see International Bus. Machs.*, 517 U.S. at 859-60; *Fairbank*, 181 U.S. at 292-93, and the recognition of a monetary remedy furthers that purpose. Indeed, absent a prompt restoration of money unlawfully exacted, the Export Clause would be more hollow than real because in the event that Congress imposed export taxes, equitable relief alone could not ameliorate the harm.

Our reading of the Export Clause also finds support in Supreme Court precedent. In *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), the Supreme Court held that the Harbor Maintenance Tax, 26 U.S.C. § 4461 (1994) (the "HMT") (classifying the tax as a duty and providing for collection by the Customs Service), as applied to exports, violated the Export Clause. *See U.S. Shoe*, 523 U.S. at 367-70. In so holding, the Supreme Court affirmed this court's

five-judge panel decision in which we also struck down the statute and awarded money damages equaling the amount exacted under the HMT. *See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1566, 1576 (Fed. Cir. 1997), *aff'g* 907 F. Supp. 408 (Ct. Int'l. Trade 1995), *aff'd* 523 U.S. 360 (1998). Thus, read in the context of the opinions below, the Supreme Court's *U.S. Shoe* decision makes clear that the Export Clause includes a correlative right to money damages as a remedy for its violation.

We also hold that the cause of action based on the Export Clause is self-executing; that is, similar to the Compensation Clause, a party can recover for payment of taxes under the Export Clause independent of the tax refund statute. In *Hatter v. United States*, 953 F.2d 626, 627 (Fed. Cir. 1992), the question before this court was whether plaintiffs could recover the exaction of social security taxes by the IRS through the Compensation Clause rather than a tax refund action. In *Hatter*, plaintiffs filed a complaint in the Claims Court alleging that the imposition of social security taxes diminished their salary in violation of the Compensation Clause, which provides that federal judges' compensation "shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The Claims Court dismissed the complaint for lack of jurisdiction because the plaintiffs did not file administrative claims for tax refunds. *See Hatter*, 953 F.2d at 627.

On appeal, this court reversed and held that the Compensation Clause itself provides a monetary remedy for diminution of judicial compensation. *See id.* at 628. We reasoned that, fairly interpreted, the Compensation Clause's mandatory and unconditional language "presupposes damages as the remedy for a governmental act violating the compensation clause. Only a timely restoration of lost

compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries." *Id.* We then found that the Claims Court incorrectly treated plaintiffs' complaint as a request for a tax refund, when the complaint sought damages for a constitutional violation. *See id.* at 629. We explained that plaintiffs could have chosen to pursue either a tax refund claim or an action based on the Compensation Clause, and because plaintiffs chose the latter, the Constitution triggered the Claims Court's jurisdiction under the Tucker Act. *See id.* at 629-30.

The present case closely parallels *Hatter* in several respects. First, both cases raise the same jurisdictional issue: whether a taxpayer can invoke jurisdiction under the Tucker Act through a constitutional provision without first complying with the tax refund statute. Second, the Export Clause and Compensation Clause employ similar language. The Export Clause provides that "*[n]o* Tax or Duty *shall be* laid," U.S. Const. art. I, § 9, cl. 5 (emphasis added), while the Compensation Clause states that "Compensation . . . *shall not be* diminished." U.S. Const. art. III, § 1 (emphasis added). Both clauses speak in absolute and unconditional terms, and both protect pecuniary interests. Third, here, as in *Hatter*, the challenged government action involves a collection of taxes by the IRS. Finally, in both cases, the court below treated plaintiffs' constitutionally-based causes of action as tax refund claims.

Because *Hatter* addressed the same issue as presented here and because the salient facts in *Hatter* are virtually identical to the present case, we find the analysis in *Hatter* to be controlling. Thus, like the plaintiffs in *Hatter*, Cyprus was not required to pursue an administrative refund claim before filing suit because the Export Clause provides a self-executing cause of action that is not subject to compliance

with the tax refund statute. Put differently, Cyprus had two alternative avenues through which to obtain relief—a tax refund action or a cause of action based on the Export Clause—and either one is sufficient to invoke the Court of Federal Claims' jurisdiction under the Tucker Act.

The Government relies heavily on *United States v. New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906), arguing that it requires a taxpayer to follow the administrative procedures for a tax refund before suing for money damages under the Export Clause. An examination of *New York & Cuba Mail*, however, reveals that the case cannot sustain the burden that the Government places on it. In *New York & Cuba Mail*, plaintiff alleged that a tax paid for stamps affixed to manifests of cargo violated the Export Clause. *See id.* at 489. Plaintiff initially sought to recover under a tax refund statute which provided that the Internal Revenue Commissioner could "redeem such of the stamps, issued under authority of law, to denote the payment of any internal revenue tax, as may have been . . . in any manner wrongfully collected." *Id.* at 494-95 (quoting Act of May 12, 1900, ch. 393, 31 Stat. 177). With "the Commissioner having declined to [issue a refund]," *id.* at 494, the plaintiff filed a complaint in district court attempting to invoke jurisdiction under the Tucker Act, *see id.* The Government demurred for failure to state a claim because plaintiff did not pay the tax under protest. *See id.* at 490-91. The district court denied the demurrer and held that the tax was unconstitutional. *See id.* at 491. On appeal, the Supreme Court reversed, ordering the demurrer sustained and finding that plaintiff's failure to protest the tax at the time of payment resulted in non-compliance with the refund statute. *See id.* at 495. Thus, read properly, *New York & Cuba Mail* stands for the unremarkable proposition that a taxpayer suing to recover under a refund statute must satisfy all the requirements

attendant to that statute. Here, given that Cyprus seeks to recover under the Export Clause rather than the tax refund statute, *New York & Cuba Mail* is of no moment.

The Government further contends that plaintiff's failure to protest in *New York & Cuba Mail* is tantamount to Cyprus's failure to file for a tax refund. That argument again misses the point. The failure to protest in *New York & Cuba Mail* was determinative because plaintiff proceeded under a tax refund statute. In this case, however, Cyprus's instant complaint is not predicated on such a statute.

The Government next attempts to distinguish *U.S. Shoe* and *Hatter* from the present case. The Government's argument is as follows: *U.S. Shoe* involved a customs "duty" and *Hatter* involved "compensation," but neither case involved recovery of a "tax" payment. Cyprus, on the other hand, seeks to recover "taxes" paid under the Coal Tax and collected by the IRS. Thus, because the Export Clause uses the term "tax" and Cyprus is challenging a "tax," it must comply with the tax refund statute before it can sue to recover its payments.

While the Government's argument may be superficially appealing, it cannot withstand close scrutiny. The significance of *U.S. Shoe* lies not in the fact that the case involved a duty rather than a tax, but in its affirmance of the Export Clause as providing a cause of action for money damages. The language of the Export Clause prohibits with equal force the burdening of exports by a duty *or* a tax. Taking the language of the Export Clause in concert with *U.S. Shoe*, it follows that the clause provides a cause of action to recover money that was unlawfully exacted through either a duty or a tax. To read *U.S. Shoe* otherwise—as endorsing a cause of action for money damages with respect to a duty but not a tax—would afflict the Export Clause with an inter-

pretive anomaly based on the form of the unlawful exaction, with no textual or precedential support for such a dichotomy.

The Government also misapprehends *Hatter*. According to its reading, the reason that the *Hatter* plaintiffs were not bound by the tax refund procedures while Cyprus is, rests on the Compensation Clause's reference to "compensation" rather than "tax." That semantic distinction, however, is ephemeral. First, regardless of whether a constitutional provision refers to compensation, duty, or tax, the pertinent inquiry is whether that provision contemplates money damages as a remedy for its violation. *See Mitchell*, 463 U.S. at 217. The touchstone of our analysis in *Hatter* and in this case is that the constitutional provision relied on by plaintiffs provides for money damages. Furthermore, in *Hatter* and the present case, the constitutional challenge stems from the same government action: a collection of taxes by the IRS. Thus, given that both the Compensation Clause and the Export Clause provide for money damages, there is no principled reason why a plaintiff challenging an IRS collection may sue independently of the tax refund statutes if proceeding under the Compensation Clause but is bound to follow those statutes if proceeding under the Export Clause.

Although Cyprus also alleges a cause of action under the Takings Clause, we need not reach that issue because the matter is properly resolved pursuant to the Export Clause.

CONCLUSION

Because we hold that the Export Clause supplies an independent cause of action for monetary remedies that invokes the Court of Federal Claims' jurisdiction under the Tucker Act, we reverse and remand for further proceedings.

REVERSED and *REMANDED.*

COSTS

Each party shall bear its own costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5060

CYPRUS AMAX COAL COMPANY, CYPRUS WESTERN COAL COMPANY, MOUNTAIN COAL COMPANY, THUNDER BASIN COAL COMPANY, CONSOL OF KENTUCKY INC., CONSOL PENNSYLVANIA COAL COMPANY, CONSOLIDATION COAL COMPANY,
GARDEN CREEK POCAHONTAS COMPANY, ISLAND CREEK COAL COMPANY, LAUREL RUN MINING COMPANY, CELROY COAL COMPANY, NINEVAH COAL
COMPANY, QUARTO MINING COMPANY, COLONY BAY COAL COMPANY, EASTERN ASSOCIATED COAL CORP., PEABODY COAL COMPANY, PINE RIDGE COAL COMPANY, ANR COAL COMPANY, LLC, COASTAL COAL, INC., MARTIKI COAL COMPANY, METTIKI COAL COMPANY, PERMAC, INC., PONTIKI COAL COMPANY, RACE FORK COAL COMPANY, EAGLE ENERGY, INC., ELK RUN COAL COMPANY, PEERLESS EAGLE COAL COMPANY, RAWL SALES & PROCESSING, CO., CANYON FUEL COMPANY LLC,, SKYLINE COAL COMPANY, SOLDIER CREEK COAL COMPANY, SOUTHERN UTAH FUEL COMPANY, EAGLE COAL COMPANY, UTAH FUEL COMPANY, BROOKS RUN COAL COMPANY, GREENBRIER COAL COMPANY, KINGWOOD COAL COMPANY, VIRGINIA IRON, COAL AND COKE COMPANY, ENTERPRISE COAL COMPANY, COASTAL DEVELOPMENT COMPANY AND SAGE POINT COAL COMPANY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed: June 8, 2000]

ORDER

A petition for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANTS, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 15, 2000.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: June 8, 2000
cc: Steven H. Becker
Gary R. Allen

CYPRUS AMAX COAL CO V US, 99-5060
(CFC - 97-CV-68)

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* Note: Pursuant to Fed. Cir. R. 47.6, this order is *
* not citable as precedent. It is a public record. *
* *
****

APPENDIX C

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 99-5060

CYPRUS AMAX COAL COMPANY, CYPRUS WESTERN COAL COMPANY, MOUNTAIN COAL COMPANY, THUNDER BASIN COAL COMPANY, CONSOL OF KENTUCKY INC., CONSOL PENNSYLVANIA COAL COMPANY, CONSOLIDATION COAL COMPANY,
GARDEN CREEK POCAHONTAS COMPANY, ISLAND CREEK COAL COMPANY, LAUREL RUN MINING COMPANY, CELROY COAL COMPANY, NINEVAH COAL COMPANY, QUARTO MINING COMPANY, COLONY BAY COAL COMPANY, EASTERN ASSOCIATED COAL CORP., PEABODY COAL COMPANY, PINE RIDGE COAL COMPANY, ANR COAL COMPANY, LLC, COASTAL COAL, INC., MARTIKI COAL COMPANY, METTIKI COAL COMPANY, PERMAC, INC., PONTIKI COAL COMPANY, RACE FORK COAL COMPANY, EAGLE ENERGY, INC., ELK RUN COAL COMPANY, PEERLESS EAGLE COAL COMPANY, RAWL SALES & PROCESSING, CO., CANYON FUEL COMPANY LLC,, SKYLINE COAL COMPANY, SOLDIER CREEK COAL COMPANY, SOUTHERN UTAH FUEL COMPANY, EAGLE COAL COMPANY, UTAH FUEL COMPANY, BROOKS RUN COAL COMPANY, GREENBRIER COAL COMPANY, KINGWOOD COAL COMPANY, VIRGINIA IRON, COAL AND COKE COMPANY, ENTERPRISE COAL COMPANY, COASTAL DEVELOPMENT COMPANY AND SAGE POINT COAL COMPANY, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

[March 14, 2000]
[Issued as a Mandate June 15, 2000]

JUDGMENT

Appeal from the United States Court of Federal Claims in 97-CV-68; 97-CV-310; 97-CV-311; 97-CV-317; 97-CV-521; and 97-CV-522, Judge Robert H. Hodges, Jr.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: **REVERSED and REMANDED**

ENTERED BY ORDER OF THE COURT

DATED: March 14, 2000

/s/ JAN HORBALY
JAN HORBALY, Clerk

ISSUED AS A MANDATE: June 15, 2000

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T,
97-521 T, AND 97-522 T (CONSOLIDATED)

CYPRUS AMAX COAL COMPANY (1), CYPRUS WESTERN COAL COMPANY (2), MOUNTAIN COAL COMPANY (3), THUNDER BASIN COAL COMPANY (4), CANYON FUEL COMPANY, LLC (5), SKYLINE COAL COMPANY (6), SOLDIER CREEK COAL COMPANY (7), SOUTHERN UTAH FUEL COMPANY (8), AND UTAH FUEL COMPANY (9), PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: January 8, 1999]

ORDER

It seems clear that plaintiffs rely primarily on their argument that reference to the administrative process in this case would be futile because an administrative agency cannot declare a statute unconstitutional. While this is an appealing argument, we do not have the authority to ignore an Act of Congress that is clear and unequivocal. 26 U.S.C. § 7422(a) states:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

This language does not permit an exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional. For this reason, we must hold that those of plaintiffs' claims that have not been submitted to the appropriate agency pursuant to statute are barred. We will dismiss those claims without prejudice. Counsel will meet within 10 days to discuss the effect of this Order on pending claims and advise the court on how they wish to proceed.

/s/ ROBERT H. HODGES, JR.
ROBERT H. HODGES, JR.
Judge

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T,
97-521 T, AND 97-522 T (CONSOLIDATED)

CYPRUS AMAX COAL COMPANY (1), CYPRUS WESTERN COAL COMPANY (2), MOUNTAIN COAL COMPANY (3), THUNDER BASIN COAL COMPANY (4), CANYON FUEL COMPANY, LLC (5), SKYLINE COAL COMPANY (6), SOLDIER CREEK COAL COMPANY (7), SOUTHERN UTAH FUEL COMPANY (8), AND UTAH FUEL COMPANY (9), PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: February 1, 1999]

ORDER

The Clerk will dismiss these consolidated cases without prejudice. No costs.

By: /s/ ROBERT H. HODGES, JR.
ROBERT H. HODGES, JR.
Judge

APPENDIX F

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Nos. 97-68 T, 97-310 T, 97-311 T, 97-317 T,
97-521 T, AND 97-522 T (CONSOLIDATED)

CYPRUS AMAX COAL COMPANY (1), CYPRUS WESTERN COAL COMPANY (2), MOUNTAIN COAL COMPANY (3), THUNDER BASIN COAL COMPANY (4), CANYON FUEL COMPANY, LLC (5), SKYLINE COAL COMPANY (6), SOLDIER CREEK COAL COMPANY (7), SOUTHERN UTAH FUEL COMPANY (8), AND UTAH FUEL COMPANY (9)

v.

THE UNITED STATES

[Filed: February 2, 1999]

JUDGMENT

Pursuant to the court's Order, filed February 1, 1999,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaints are dismissed without prejudice. No costs.

Margaret M. Earnest
Clerk of Court

February 2, 1999 By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing Fee is $105.00.

Supreme Court, U.S.
FILED
NOV 9 2000
CLERK

(2)

No. 00-360

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CYPRUS AMAX COAL COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CYPRUS AMAX COAL COMPANY, ET AL.

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20 pp

QUESTIONS PRESENTED

1. Whether the Federal Circuit correctly ruled that parties bringing suit for restitution for the government's violation of the Export Clause of the Constitution may invoke the Court of Federal Claims' jurisdiction under the Tucker Act based on that self-executing, money-mandating constitutional provision, independent of the tax refund procedures contained in the Internal Revenue Code.

2. Whether the applicable statute of limitations in a Tucker Act suit founded upon the Export Clause is governed by 26 U.S.C. § 6511(a), which by its terms applies not to suits but rather to administrative claims, or by 28 U.S.C. § 2401(a), which by its terms expressly applies to civil suits against the United States.

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

There have been two changes in ownership of the parties listed by Petitioner. First, Cyprus Amax Coal Company has been merged into RAG American Coal Company, which is owned by RAG American Coal Holding, Inc., which in turn is owned by RAG International Mining GmbH. None of these companies is publicly traded. Second, Mettiki Coal Company, Martiki Coal Company, Permac, Inc., Race Fork Coal Company, and Pontiki Coal Company are now owned by Alliance Coal, LLC, which is owned by Alliance Operating Partners, L.P., which in turn is owned by Alliance Resource Partners, L.P., a publicly traded company.

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STATEMENT

Respondents are United States producers, sellers and exporters of coal. In 1997 respondents filed separate lawsuits (which were ultimately consolidated) in the United States Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a), challenging the imposition of a federal excise tax (the "coal tax") on respondents' sales of coal for export from the United States. The coal tax was imposed pursuant to 26 U.S.C. § 4121, and although Congress generally exempts from excise taxes articles sold for export, Congress did not exempt export sales of coal. *See* 26 U.S.C. § 4221(a)(2) (providing that "no tax shall be imposed under [the Manufacturers Excise Taxes] chapter (*other than under section 4121* . . .) on the sale by the manufacturer . . . of an article . . . for export, or for resale by the purchaser to a second purchaser for export.") (emphasis added). Respondents alleged that the coal tax violates the Export Clause of the United States Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. CONST. art. I, § 9, cl. 5.

Based on 26 U.S.C. §§ 6532(a) and 7422(a), the government moved to dismiss the complaints of those respondents which either did not file a tax refund request with the Internal Revenue Service prior to filing suit, or which filed suit without waiting until their administrative refund requests had been denied or six months had passed without action on the part of the IRS. In an opinion of less than two pages, the Court of Federal Claims ruled that respondents' claims that were not submitted to the IRS "pursuant to statute" were barred. Pet. App. 21a. After characterizing respondents' arguments in restricted fashion, stating that "it seems clear" that respondents "rel[ied] primarily on their argument that reference to the administrative process in this case would be futile because an administrative agency cannot declare a statute unconsti-

tutional," the court concluded that 26 U.S.C. § 7422(a) does not permit an exception for cases in which a tax statute is alleged to be unconstitutional. Pet. App. 20a-21a. The court subsequently entered judgment dismissing respondents' complaints without prejudice (Pet. App. 22a), from which respondents appealed to the Court of Appeals for the Federal Circuit.

While respondents' suits were pending in the Court of Federal Claims, the coal tax was held to be unconstitutional as applied to sales for export, in a case to which respondents were not parties. *See Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998). The government did not appeal *Ranger Fuel* and, in May 2000, the Internal Revenue Service issued a notice indicating its acquiescence in that court's decision. Notice 2000-28, 2000-21 I.R.B. 1116 (May 22, 2000).

In respondents' appeal, the Federal Circuit unanimously reversed the Court of Federal Claims' dismissal of respondents' actions and remanded the cases back to the Court of Federal Claims. Pet. App. 1a-14a. Addressing an issue that it had raised *sua sponte* at oral argument, the Federal Circuit ruled that the appeal had not been rendered moot by respondents' re-filing of protective suits under 26 U.S.C. §§ 6532 and 7422(a) following the dismissal of their actions by the Court of Federal Claims. The Federal Circuit concluded that it could provide meaningful relief to respondents inasmuch as there is a six-year statute of limitations for a cause of action brought under the Tucker Act, but only a three-year period in which to file an administrative claim for a tax refund with the IRS under 26 U.S.C. § 6511(a). Pet. App. 5a-6a.

The Federal Circuit then noted, in accordance with this Court's decisions in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 463 U.S. 206 (1983), that the Tucker Act constitutes a waiver of sovereign

immunity by the United States where a party points to a complementary substantive right found in another source of federal law, such as the Constitution, which can be "fairly interpreted as mandating compensation by the Federal Government for the damages sustained." Pet. App. 6a-7a (citing *Mitchell*, 463 U.S. at 217, and *Testan*, 424 U.S. at 400). The court held that the Export Clause's unqualified proscription against export taxation necessarily implies a cause of action with a monetary remedy when taxes are imposed in contravention of the clause. The court stated: "[G]iven a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy." Pet. App. 8a. The Federal Circuit also observed that this recognition of a monetary remedy furthers the purpose of the Export Clause as articulated by the Framers—to free all exports from the burden of taxation. *Id.* The court found additional support for its conclusion as to the "money-mandating" nature of the Export Clause in this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), in which the Court unanimously affirmed the Federal Circuit's decision (1) holding the Harbor Maintenance Tax, 26 U.S.C. § 4461, unconstitutional as applied to exports, and (2) awarding money damages equaling the amount of taxes imposed. The Federal Circuit noted that the Court's decision in *U.S. Shoe* "makes clear that the Export Clause includes a correlative right to money damages as a remedy for its violation." Pet. App. 9a.

The Federal Circuit then held that the Export Clause provides a "self-executing cause of action that is not subject to compliance with the tax refund statute." Pet. App. 10a. In reaching this conclusion, the court analogized the Export Clause to another self-executing constitutional provision, the Compensation Clause, U.S. CONST. art. III, § 1, which prohibits the diminution of compensation paid to Article III judges during their continuance in office and gives rise to a

cause of action independent of the tax refund statute. Pet. App. 9a.[1] The Federal Circuit noted that similar to the Compensation Clause, the Export Clause speaks in absolute and unconditional terms, protects pecuniary interests, and presupposes money damages as a remedy for its violation. *Id.* at 10a. Because the Federal Circuit found that respondents had properly invoked the Court of Federal Claims' subject matter jurisdiction under the Tucker Act based on the self-executing Export Clause, it did not reach respondents' alternative argument which alleged a cause of action under the Tucker Act pursuant to the Takings Clause of the Fifth Amendment.

REASONS FOR DENYING THE WRIT

The government presents two questions as warranting review by the Court: (1) whether a taxpayer may commence an action to recover "an unconstitutional tax" without filing a claim for refund under 26 U.S.C. § 7422(a), and (2) whether an action to recover "an unconstitutional tax" is subject to the statute of limitations set forth in 26 U.S.C. § 6511(a) rather

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[1] For this latter proposition, the court cited *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992), a decision in which the Federal Circuit held that the Compensation Clause provided a self-executing remedy in the event of governmental violation of that Clause. On October 16, 2000, this Court granted the government's petition for writ of certiorari (No. 99-1978) with respect to a subsequent decision in *Hatter*, 203 F.3d 795 (Fed. Cir. 2000). That later decision, unlike the 1992 decision, addressed the substantive merits of the Compensation Clause claims in *Hatter*. Neither the government's petition in *Hatter* nor the Federal Circuit's 2000 decision in that case addressed either the point for which the 1992 *Hatter* decision had been relied upon below or the issues on which the government now seeks review in this case.

Accordingly, there is no need for the Court to withhold consideration of the government's petition in this case until final resolution of *Hatter* in case No. 99-1978.

than the statute of limitations set forth in 28 U.S.C. § 2401(a). According to the government, the Federal Circuit broadly "conclud[ed] that the statutory restrictions on the recovery of taxes paid to the United States are inapplicable to suits in which a taxpayer contends that the tax is unconstitutional" (Pet. 16), thus "creating an exception for an entire class of tax refund suits from the detailed tax administration provisions enacted by Congress . . ." (Pet. 23). The Federal Circuit did not, however, hold what the government asserts it held, and it did not carve out any broad exception for constitutional claims as the government suggests. On the contrary, the court's actual holding is consistent with pertinent precedents of this Court and will have very limited consequences.

1. The Federal Circuit's Decision Was Narrowly Drawn and in Accord With Pertinent Precedents of This Court, and Will Not Adversely Impact Upon the Administrative Tax Refund Procedures.

The first question presented by the government suggests that the Federal Circuit created a broad exception from the provisions of 26 U.S.C. § 7422(a) for any challenge to the constitutionality of a tax statute. In this regard, the government's petition asserts that "[t]he decision of the court of appeals in the present case . . . holds that compliance with the statutory administrative refund requirements is unnecessary when it is alleged that the tax is unconstitutional . . ." Pet. 22. The court of appeals did not so hold. Indeed, the holding of the Federal Circuit, which has been considered "the court of appeals that probably spends the most time mastering the intricacies of jurisdiction under the Tucker

Act,"[2] was far narrower, with exceedingly limited consequences for future tax litigation.

The Federal Circuit actually held that respondents' suits are cognizable under the Tucker Act independent of the tax refund statutes because they are founded upon a *self-executing* constitutional provision, the Export Clause, that is fairly interpreted as *mandating compensation*, as required by this Court's decisions in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 463 U.S. 206 (1983).[3] Although the government portrays the Federal Circuit's decision in sweeping terms as applying any time the constitutionality of a tax statute is challenged, the decision is far more limited, because self-executing, money-mandating constitutional provisions—the only constitutional provisions implicated by the court's decision—are but few in number. Only the Takings Clause of the Fifth Amendment, the Compensation Clause, and the Export Clause meet this criteria. Indeed, the Federal Circuit's reasoning is of even

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[2] *Licata v. United States Postal Service*, 33 F.3d 259, 263 (3rd Cir. 1994).

[3] In finding that the Export Clause, fairly interpreted, mandates compensation when it is violated, the Federal Circuit relied upon the language of the clause, which presupposes a monetary remedy; the purpose of the clause, which is to free exports from the burden of federal taxation; and finally, this Court's decision in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). *See* Pet. App. 7a-9a. The government maintains that the Federal Circuit "overlooked" the fact that Congress provided that the tax at issue in *U.S. Shoe*, the Harbor Maintenance Tax, was to be treated for administration and enforcement purposes as a customs duty rather than a tax. Pet. 16. The government's assertion is both erroneous and beside the point. As the Federal Circuit correctly noted, "[t]he significance of *U.S. Shoe* lies not in the fact that the case involved a duty rather than a tax, but in its affirmance of the Export Clause as providing a cause of action for money damages." Pet. App. 12a.

narrower effect because the imposition of taxes can only rarely implicate the Takings Clause.[4]

Previous decisions of the Federal Circuit confirm that its holding below is inapplicable to suits by taxpayers founded upon other constitutional provisions. For example, the Federal Circuit has held that jurisdiction cannot lie under the Tucker Act in a suit founded upon the Fourth Amendment that challenges the assessment and collection of income taxes because "the Fourth Amendment does not mandate the payment of money for its violation." *Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997). The Federal Circuit has similarly rejected claims that myriad other federal constitutional provisions are money-mandating. *See, e.g.*, *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (Due Process Clauses of the Fifth and Fourteenth

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[4] *See, e.g., 287 Corporate Center Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 n.5 (3rd Cir. 1996) ("levying taxes does not rise to the level of a Fifth Amendment taking unless it was so 'arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property . . .'") (quoting *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916)). The instant case is one such rare instance. In view of the mandatory and unconditional language of the Export Clause, the sole express constitutional prohibition on Congress' taxing power, Congress expressly exempted virtually all exported merchandise from manufacturers' excise taxes—but not coal. *See* 26 U.S.C. § 4221(a). Congress' intentional targeting of the coal industry exposes the tax on coal exports as one which is so "arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property," thereby implicating the Takings Clause and entitling respondents to "just compensation."

The fact that the Takings Clause provides an independent basis under the Tucker Act for the Court of Federal Claims to exercise jurisdiction, and thus an independent basis upon which the decision below is sustainable, further warrants denial of the government's petition. Moreover, the broad exemption from taxation given by 26 U.S.C. § 4221(a) to products *other* than coal confirms that cases under the Export Clause will also be rare.

Amendments, Equal Protection Clause of the Fourteenth Amendment, and doctrine of separation of powers); *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983) (First Amendment). *See also Milas v. United States*, 42 Fed. Cl. 704, 710 (1997), *aff'd without opinion*, 1999 U.S. App. LEXIS 26810 (Fed. Cir. Oct. 12, 1999) (Sixth Amendment); *Bernaugh v. United States*, 38 Fed. Cl. 538, 541 (1997), *aff'd without opinion*, 168 F.3d 1319 (Fed. Cir. 1998) (Double Jeopardy Clause of the Fifth Amendment and Excessive Fines Clause of the Eighth Amendment); and *Calhoun v. United States*, 32 Fed. Cl. 400, 405 (1994), *aff'd without opinion*, 61 F.3d 918 (Fed. Cir. 1995) (Cruel and Unusual Punishment proscription of the Eighth Amendment). Thus, in the event that a taxpayer plaintiff would attempt to invoke Tucker Act jurisdiction based on such provisions, it would find the Federal Circuit's decision below to be unavailing.[5]

The government notably does not take issue with the central underpinning of the Federal Circuit's decision, *i.e.*, its finding as to the money-mandating nature of the Export Clause in accordance with the *Mitchell* and *Testan* criteria. Nor does the government deny the self-executing nature of a cause of action under the Export Clause, for the right to a monetary remedy for the unconstitutional taxation of exports is "guaranteed by the Constitution" such that "[s]tatutory recognition [is] not necessary." *Jacobs v. United States*, 290

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[5] Nor is there any risk that the Federal Circuit's decision will "disrupt ordinary appellate practice" by funneling appeals of Constitution-based, district court tax suits involving less than $10,000 to the Federal Circuit, rather than to regional courts of appeals, as the government suggests (Pet. 13 n.9). To viably invoke a district court's jurisdiction under 28 U.S.C. § 1346(a)(2), over which the Federal Circuit has appellate jurisdiction, taxpayers would still have to point to a money-mandating provision; otherwise, their only viable recourse would be to proceed under 28 U.S.C. § 1346(a)(1), over which the regional courts of appeals, rather than the Federal Circuit, have appellate jurisdiction.

U.S. 13, 16 (1933) (discussing self-executing constitutional right to just compensation in the event of a Fifth Amendment "taking"). Instead, the government distorts the Federal Circuit's holding, claiming that it permits a wholesale "exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional." Pet. 15 (quoting decision of the Court of Federal Claims, Pet. App. 21a). Although there can be little dispute that it is the province of the courts, not the IRS, to resolve the constitutionality of a tax statute, and that no compelling purpose or national interest is served in this case by requiring respondents to pursue a futile administrative process, the Federal Circuit did not base its decision on such grounds. Thus, the government's implication that review by the Court is warranted because the Federal Circuit has paved the way for taxpayers to avoid administrative refund procedures, simply by raising a constitutional claim, is baseless.

2. The Government's Statute of Limitations Argument Rests on a Misreading of Both the Tax Code Provisions and This Court's Decisions.

In a separate line of attack, the government claims that the Federal Circuit's decision alters the applicable statute of limitations from three years to six years. Pet. 19-20. The government thus frames the second question presented as whether an action to recover "an unconstitutional tax" (once again overstating the Federal Circuit's holding) is subject to the statute of limitations in 26 U.S.C. § 6511(a), which requires administrative tax refund claims to be filed with the IRS within either three years of the filing of a tax return or within two years of the payment of the tax, instead of the statute of limitations in 28 U.S.C. § 2401(a), which requires civil suits against the United States to be filed within six years after the right of action first accrues.

Although the government asserts that the Federal Circuit "failed to address either the specific text of the applicable statutory provisions or the controlling decisions of this Court" regarding the statute of limitations (Pet. 22), the government neglects to mention that it did not raise any statute of limitations arguments before the three-judge panel, but instead belatedly raised those arguments for the first time in its petition for rehearing en banc. The government's suggestion that the Federal Circuit disregarded or ignored anything of pertinence is therefore misleading.

Moreover, the government's statute of limitations argument is flawed inasmuch as it asks the Court to find a conflict between two limitations provisions that are in fact addressing different subject matters. Specifically, the government asks the Court to override 28 U.S.C. § 2401(a), a statute of limitations applicable to *lawsuits*, with a statute of limitations under 26 U.S.C. § 6511(a) that is not applicable to lawsuits at all, but rather to *administrative* claims. Nor does the case upon which the government principally relies, *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941) (which did *not* involve a self-executing, money-mandating constitutional provision) support the government's argument that a three-year limitations period applies. The statute of limitations considered in *Kreider*, § 1113(a) of the Revenue Act of 1926 (44 Stat. 9, 116), in no way parallels 26 U.S.C. § 6511(a). Although the government characterizes § 1113(a) as the "predecessor of the current tax-refund statute of limitations in 26 U.S.C. § 6511(a)" (Pet. 20), the provisions are very different from one another. Section 1113(a) prescribed the period for bringing a *lawsuit*, providing that *suits* for the recovery of an internal revenue tax must be brought within five years from the date of the payment of the tax. *See Kreider*, 313 U.S. at 446. Thus, the Court's ruling that the five-year limitations period for bringing *suit* under § 1113(a) prevailed over the six-year limitations period for bringing suit under the Tucker Act in no way stands for the

proposition asserted by the government—that a statute of limitations for bringing an administrative claim may be engrafted onto and supersede the statute of limitations for filing suit under the Tucker Act.[6]

The other case upon which the government principally relies in its statute of limitations discussion, *United States v. New York & Cuba Mail S.S. Co.*, 200 U.S. 488 (1906), is also inapposite. The government asserts that in *Cuba Mail* the Court dismissed a Tucker Act suit seeking a refund of taxes imposed in violation of the Export Clause because the taxpayer had failed to comply with a "statutory prerequisite"—a pre-payment administrative protest—before bringing suit. Pet. 22. This is an inaccurate portrayal of *Cuba Mail*. The "statutory prerequisite" to which the government refers was in fact a long-standing *common-law* rule that there was no cause of action to recover a tax that had been voluntarily paid without duress and with no form of protest at the time of payment. The Court noted the "applicable principle" that "[w]here a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back." *Cuba Mail*, 200 U.S. at 493,

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[6] The statute of limitations provided in the Internal Revenue Code for filing *suit* has not even been triggered yet in this case. Section 6532(a) of the Tax Code, 26 U.S.C. § 6532(a), provides that no suit under 26 U.S.C. § 7422(a) for the recovery of internal revenue taxes may be begun before the expiration of six months from the filing of an administrative refund claim nor after the expiration of two years from the date on which the IRS mails notice of its decision. The IRS, however, has yet to act upon the administrative refund claims that respondents filed (after expiration of the six-month waiting period) as a protective measure during the pendency of their appeal.

494 (citations omitted). The Court simply concluded that this common-law principle applied in the Export Clause context and that it had not been abrogated by Congress. *Id.* at 495. There is no conflict whatever between *Cuba Mail* and the decision below, because, subsequent to *Cuba Mail*, Congress has in fact statutorily abrogated the "voluntary payment" rule.[7]

* * * *

The fundamental issue which gave rise to respondents' suits—the constitutionality of the coal tax under the Export Clause—was resolved in respondents' favor in *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), and the government has acquiesced in that decision. The remaining issue dealt with by the Federal Circuit, namely, whether respondents may invoke the Court of Federal Claims' jurisdiction independent of the refund provisions of the Internal Revenue Code, is merely one of statutory construction with limited applicability. The government is thus incorrect in describing the Federal Circuit's decision as one of "exceptional importance" (Pet. 13) which "voids the administrative prerequisites for a tax refund suit." Pet. 18. The reality, as discussed above, is that the government has mischaracterized the holding of the Federal Circuit and exaggerated its implications. The Federal Circuit's decision turned on the self-executing character of one of the very few "money-mandating" provisions in the Constitution, the Export Clause. Thus, by definition, the decision will have little impact on the operation of the refund provisions of the Tax Code. Because the Federal Circuit's decision was correctly decided and does not present an issue with

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[7] Revenue Act of 1924, ch. 234, § 1014(a), 43 Stat. 253, 343.

significant implications, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-360

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CYPRUS AMAX COAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. a. Respondents make no effort to explain or justify the erroneous holding of the court of appeals that a taxpayer may commence an action to recover an unconstitutional tax without filing a timely claim for refund. Section 7422(a) of the Internal Revenue Code specifies that "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has

been duly filed with the Secretary." 26 U.S.C. 7422(a).[1] And, Section 6511(a) requires claims for refund "of any tax imposed by this title" to be filed within three years of the date of the taxpayer's return or within two years of the date "the tax was paid, whichever of such periods expires the later." 26 U.S.C. 6511(a). It is undisputed that respondents failed to conform to these statutory prerequisites to "the recovery of any internal revenue tax." 26 U.S.C. 7422(a). The plain text of these statutory provisions thus bars any suit for the recovery of the internal revenue taxes sought in this case. See Pet. 14-15; note 1, *supra*.

In addition to ignoring the governing text of these statutory provisions, the decision of the court of appeals neglects to consider the controlling decisions of this Court. This Court has made clear that these statutory restrictions on suits to recover taxes paid to the United States effect a waiver of the government's sovereign immunity from suit, and that the authority of courts to maintain such a suit is therefore "conditioned on the filing of a claim" in strict compliance with these statutes. *United States* v. *Michel*, 282 U.S. 656, 658 (1931). Indeed, as recently as *Commissioner* v. *Lundy*, 516 U.S. 235 (1996), this Court emphasized that the statutory requirements "governing refund suits in United States District Court or the United States Court of Federal Claims * * * make timely filing of a refund claim a jurisdictional prerequisite to bringing suit, see 26 U.S.C. § 7422(a)." 516 U.S. at 240. See also Pet. 15-18 & n.12. Neither respondents nor the court of appeals

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[1] Respondents conceded at oral argument in the court of appeals that the tax involved in this case is "an internal revenue tax." Tr. of Arg. at 7 (Feb. 10, 2000). See also Pet. 19.

offer any basis for disregarding either the controlling statutory text or the decisions of this Court.

b. Instead of addressing the serious analytical deficiencies in the holding of the court of appeals, respondents simply assert (Br. in Opp. 6) that the decision in this case will have little impact because it will apply only when the tax is allegedly imposed in violation of "money-mandating constitutional provisions."[2] Respondents suggest (*ibid.*) that—under Federal Circuit precedent issued to this point in time—the "money-mandating" provisions of the Constitution include only the Export Clause, the Takings Clause and the Compensation Clause.

We do not agree with the central premise of respondents' assertion—that there is little of importance in a refusal by the Federal Circuit to abide by statutory restrictions on claims against the United States. The responsibility of that circuit to honor these statutory restrictions, and to apply the decisions of this Court interpreting those statutes, is a matter of the highest importance to the United States. Essentially *all* claims against the United States may be brought in that circuit; and many such claims may be brought *only* in that circuit. If the laws that Congress has provided for

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[2] Respondents seek to convey the impression that the United States ignored this aspect of the court's decision. In fact, the petition expressly states that, "[u]nder the decision in this case, the statutory prerequisites to a tax refund suit are irrelevant if the tax has assertedly been imposed in violation of the Export Clause or any other constitutional provision that can be interpreted as supporting a claim for monetary relief." Pet. 23. While respondent asserts that the decision below applies only to "money-mandating constitutional provisions," there is nothing in the opinion itself to suggest that "money-mandating statutory provisions" are not also encompassed within the court's reasoning.

the recovery upon claims against the United States, and the decisions of this Court interpreting those statutes, are not properly applied in the Federal Circuit, those statutes and decisions will simply be rendered ineffective.

In particular, the suggestion of the court of appeals that the general provisions of the Tucker Act somehow provide that court with jurisdiction to override statutory restrictions on suits to recover taxes (Pet. App. 6a-7a) is an extraordinarily broad (and incorrect) proposition. See Pet. 23-24. The statute of limitations on tax claims is "one of th[e] terms" that limits the consent of the United States to suit "in any court." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). That statute applies and governs in the Court of Federal Claims and in the Federal Circuit just as it does "in any [other] court."

2. a. In the petition, we explain that Section 6511(a) of the Internal Revenue Code imposes a three-year statute of limitations on claims for the recovery of taxes from the United States and that Section 7422(a) specifies that failure to comply with that time limit prohibits "any court" from maintaining a suit "for the recovery of any internal revenue tax." 26 U.S.C. 7422(a). See Pet. 18-22. We also point out that this Court held in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941), that the specific statute of limitations that governs tax claims applies even when (as here) tax refund claims are brought under the Tucker Act in the Court of Federal Claims. In *Kreider*, this Court expressly held that the general six-year statute of limitations for claims brought in the Court of Federal Claims (28 U.S.C. 2401(a), 2501)) is inapplicable when, as here, Congress has provided a "different and shorter period of limitation [for this] individual class of actions." 313 U.S. at 447.

Respondents make no effort to deny the obvious importance of the contrary holding of the court of appeals in this case. The conclusion of the Federal Circuit that the three-year statute of limitations on tax claims is inapplicable for a suit brought under the Tucker Act is extraordinary not only because this Court held precisely to the contrary in *Kreider* but also because, as we explain in the petition (Pet. 17 n.12), *every* tax refund suit brought in the Court of Federal Claims is brought under the Tucker Act. The decision in this case is thus not only manifestly incorrect. It has an extremely broad and recurring importance.

b. Respondents underscore the recurring importance of this statute of limitations issue by making the surprising contention that the *Kreider* case is no longer valid authority. Respondents assert that the statute of limitations on tax claims involved in *Kreider* differs from the statute of limitations contained in Section 6511(a) of the Internal Revenue Code, which respondents characterize as concerning only when "an administrative claim" may be brought, rather than "the period for bringing a *lawsuit*" (Br. in Opp. 10, 11). In making that argument, however, respondents simply ignore Section 7422(a) of the Code, which provides that, when a claim for refund is *not* "duly filed" in compliance with the requirements of Section 6511(a), "*[n]o suit or proceeding shall be maintained in any court* for the recovery of [the] tax." 26 U.S.C. 7422(a) (emphasis added). Respondents' effort to distinguish the statute of limitations involved in *Kreider* from the statute involved in the present case is thus plainly unavailing.

Moreover, the proposition that respondents seek to advance would require a bizarre and illogical conclusion. On respondents' theory, tax refund claims, which are unquestionably subject to a three-year statute of

limitations in the district courts, would instead obtain a *six*-year statute of limitations simply by being filed in the Court of Federal Claims. This Court concluded sixty years ago in the *Kreider* case that Congress has not provided for that manifestly incongruous result.

c. Finally, respondents assert (Br. in Opp. 10) that the failure of the court of appeals to honor the three-year statute of limitations on tax claims does not warrant review by this Court because the court's error was first pointed out to it by the government in a petition for rehearing following entry of the panel's decision. In fact, however, the government argued in a brief filed four months before argument to the panel that only "tax payment[s] * * * made within the 3-year statute of limitation applicable to tax-refund suits" may be recovered by respondents. U.S. Supp. Brief at 6 (filed Sept. 7, 1999). Moreover, respondents have acknowledged that the theory adopted by the court of appeals in this case—that the general six-year statute of limitations for actions in the Court of Federal Claims can apply even to a tax refund claim brought in that court—was not raised by either of the parties. Instead, this theory was devised by the court itself in "[a]ddressing an issue that [the court] raised *sua sponte* at oral argument." Br. in Opp. 2. The government can hardly be faulted for not anticipating in its briefing to the panel that the court would adopt a line of reasoning that had not been urged by either party and that directly conflicts with this Court's decision in the *Kreider* case.

Moreover, following entry of the panel decision, the government promptly informed the court of appeals of the inconsistency between the decision in this case and the *Kreider* decision and requested rehearing en banc to address that conflict. The court of appeals denied the

petition for rehearing even though the court was fully informed of the manner in which the panel's decision has departed from *Kreider* and of the substantial, recurring importance of that statute of limitations issue. Review by this Court is warranted (i) to ensure enforcement in the Federal Circuit of the carefully articulated statutes of limitation that Congress has provided for actions to recover internal revenue taxes from the United States and (ii) to require the Federal Circuit to conform to the controlling decisions of this Court that have addressed these very issues.

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

Supreme Court, U.S.
FILED
MAY 22 2001
OFFICE OF THE CLERK

(H)

No. 00-360

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

CYPRUS AMAX COAL COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS CYPRUS AMAX COAL COMPANY, ET AL.

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May 22, 2001

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SUPPLEMENTAL BRIEF OF THE RESPONDENTS

Pursuant to this Court's Rule 15.8, respondents file this supplemental brief to address the relevance of the Court's decision in *Hatter v. United States*, No. 99-1978 (U.S. May 21, 2001) ("*Hatter II*"), which was not available when respondents filed their Opposition to the Petition for a Writ of Certiorari.[1]

As the United States noted in its petition for a writ of certiorari in this case, "the sole authority" relied upon by the court of appeals for the proposition that respondents could bring a damages action based on the Export Clause as a self-executing constitutional provision, and independently of the tax refund statute, 26 U.S.C. § 7422(a), "was [the Federal Circuit's] own decision in *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992)" ("*Hatter I*"). Petition at 11. In *Hatter II*, the Court has now upheld on the merits the self-executing constitutional damages action in that case, striking down under the Compensation Clause the 1983 imposition of social security taxes on federal judges' salaries. Slip. op. 13-19.

In addition to the reasons stated in respondents' initial opposition, *Hatter II* confirms that the petition here should be denied. In affirming the court of appeals' ruling with respect to social security taxes, *Hatter II* has necessarily sustained the Federal Circuit's jurisdictional predicate for both that litigation and this – that a self-executing constitutional provision can be the basis for a direct Tucker Act damages

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[1] Respondents presume that consideration of the petition in this case has been held pending a ruling in *Hatter II*.

action independently of the tax refund statute.[2] Moreover, *Hatter II* recognized the applicability of the six-year statute of limitations of 28 U.S.C. §§ 2401(a) & 2501 to cases of this category. Slip op. 5.

Accordingly, this case presents no issues worthy of certiorari. Nothing in *Hatter II* calls into question the Federal Circuit's decision in this case. To the contrary, this Court's affirmance in *Hatter II* with respect to social security taxes fully supports the jurisdictional and statute-of-limitation rulings of the court below.

Accordingly, the petition should be denied.

Respectfully submitted,

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MAY 22, 2001

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[2] Given the jurisdictional nature of this rule, it had to be considered by the Court in *Hatter II* even if not raised by the parties. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998) (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278-79 (1977) and *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

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CYPRUS AMAX COAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

No. 00-360

UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SUPPLEMENTAL BRIEF OF THE UNITED STATES

Pursuant to Rule 15.8 of the Rules of this Court, the United States submits this supplemental brief to respond to the suggestion of respondent that the recent decision of this Court in Hatter v. United States, No. 99-1978 (May 21, 2001), has relevance to the disposition of this petition.

1. In the petition, we note that the court of appeals erred in this case in suggesting that its prior decision in the Hatter case provided support for its holding that this suit to recover taxes is not subject to the restrictions on tax refund suits established by Congress in 26 U.S.C. 6511, and 26 U.S.C. 7422(a). Pet. 18. We pointed out that the Hatter case was a suit to recover "compensation" and was not a suit to challenge the validity of, or to seek a refund of, any tax. Pet. 18. Because it was a suit to recover "compensation," the action in that case was not subject to the restrictions on tax refund suits that are involved in this case. See ibid. We made this same point in

our brief on the merits in this Court in the Hatter case. U.S. Br. No. 99-1978 at 8-9 n.7.

In this Court's decision in Hatter, the Court made this same distinction. Although the Court did not find it necessary to address this issue in any detail, the opinion in Hatter emphasized that the suit in that case was brought by the judges "for `compensation' in the United States Claims Court." Slip. Op. 5. Thus, far from providing any support for the erroneous decision in the present case, the decision in Hatter endorses the understanding that jurisdiction in the Court of Claims in that case was based on a claim for recovery of "compensation" rather than on a claim for the refund of "taxes." The decision of this Court in Hatter thus plainly does not support respondent's erroneous suggestion that jurisdiction of an action for the recovery of taxes exists under the Tucker Act "independently of the tax refund statute." Resp. Supp. Br. 2.

2. Respondent errs in asserting (Resp. Supp. Br. 1) that the decision of this Court in Hatter provides support for the conclusion of the court of appeals in the present case that a claim for the recovery of allegedly unconstitutional taxes need not comply with the statutes that govern "the recovery of any internal revenue tax" (26 U.S.C. 7422(a)). Nothing in Hatter addresses in any fashion the detailed statutory scheme enacted by Congress that limits actions "in any court" (ibid.) for the recovery of a tax. It is precisely because the court of appeals held in this case that suits for the recovery of an internal revenue tax may be brought in that circuit without complying with these governing statutes that review is warranted in this case. See Pet. 18-19 ("[t]he decision of the court of appeals not only voids the

administrative prerequisites for a tax refund suit, it also alters the statute of limitations that applies to such suits").

Moreover, nothing in Hatter addresses (and certainly does not overrule) the decision of this Court in United States v. A.S. Kreider Co., 313 U.S. 443 (1941). The decision of the court of appeals in the present case conflicts directly with that controlling precedent of this Court. See Pet. 20-22.

Respectfully submitted.

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May 2001